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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 130

INDIANAPOLIS BREWING COMPANY, INC.,
Appellant,

vs.

THE LIQUOR CONTROL COMMISSION OF THE STATE OF MICHIGAN ET AL.,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

APPELLANT'S REPLY BRIEF.

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INDEX.

SUBJECT INDEX.

	Page
Concessions of the appellee	1
Reply argument	9
Postponement of date does not render case moot	9
Equal protection of the laws, points 2 and 3	9
No effective denial of subversive effect of Michigan Act upon Twenty-first Amendment	11
Indiana Act not retaliatory and immaterial to rights of appellant	12
Summary of certain contentions	2
Appellees' cases on retaliatory laws	12

CASES CITED.

A. & P. Tea Co. v. *Grosjean*, 301 U. S. 412	8
Hendrick v. *Maryland*, 235 U. S. 610	5
Kane v. *New Jersey*, 242 U. S. 160	6
Kentucky Whip & Collar Co. v. *Ill. Central R. R. Co.*, 299 U. S. 334	7
Louis K. Liggett Co. v. *Baldridge*, 278 U. S. 105, 113	10
Pierce v. *Society of Sisters*, 268 U. S. 510, 535, 536	9
Philadelphia Fire Assoc. v. *New York*, 119 U. S. 110	4
State Board of Equalization v. *Youngs Market Co.*, 299 U. S. 59, 62	10
Vicksburg Water Works Co. v. *Vicksburg*, 185 U. S. 65, 82 (46 L. Ed. 808, 815)	9
Whitfield v. *Ohio*, 297 U. S. 431	7

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I.

Concessions of the Appellee.

1. As to the statement of the record:

Appellee concedes that appellant has accurately stated the record, appellee's brief, p. 3.

However, appellee has correctly supplemented the appellant's statement of facts in respect to the formal admission of the appellant as a foreign corporation to do *intrastate* business within the State of Michigan, the only license issued to the appellant being a license under the law of the State of Michigan to import, sell and deliver

beer to licensed wholesalers and retailers within Michigan, which appellant contends renders it a person within the jurisdiction of Michigan in respect to the business covered by such license.

2. As to the basis of jurisdiction:

Appellee concedes that appellant has correctly stated the grounds of jurisdiction, appellee's brief, p. 2.

But as appellee has stressed by exclusive mention "diversity of citizenship" as a ground of jurisdiction, appellee's brief, p. 16, appellant now refers to appellant's bill, clause 5, R. 5, and also to appellant's brief, p. 5, where it appears that the bill also expressly predicates jurisdiction upon the Federal questions involved.

3. Appellee expressly concedes that the questions in this appeal are not moot, appellee's brief, p. 3.

II.

Summary of Certain Contentions of Appellant.

It is the contention of the appellant that the word "laws" in the Amendment contains the implied exception of statutes enacted with due formalities but which nullify or tend to nullify the Amendment itself; and it is also the contention of the appellant that the word "laws" referred to in the Amendment, stands subject to the same inhibitions in respect to the alcoholic traffic as any other statute would stand, save only when to recognize any such inhibitions would be to defeat the purpose of the Amendment. It is the further contention of the appellant that to the extent at least that the commerce clause of the Constitution is needed to uphold or support the Twenty-first Amendment, the commerce clause retains its full vigor for that purpose. It is also the contention of the appellant that in so far as a State statute may be primarily retaliatory, though inci-

dentally regulatory, it does not fall within the category of "laws" covered by the dispensation of the Amendment for the reason not only that the people of the country did not at the time of the adoption of the Twenty-first Amendment contemplate the promotion of retaliation or any corresponding modification of the commerce clause, but because this very retaliation, based upon the act of a State taking advantage of the Twenty-first Amendment, strikes directly at the vitality of the Amendment itself. Clearly in this sense the commerce clause is needed to prevent the breaking down of the Twenty-first Amendment.

Moreover, the word "laws" in the Amendment was not intended to relieve a State from the inhibitions of the equal protection and due process clauses of the Constitution, excepting, of course, where the purpose of the Twenty-first Amendment necessarily so requires, or where there appears upon the face of the Amendment a classification recognized thereby. Certainly the classification of foreign beers with reference to the laws of their respective States of origin is not a classification which appears upon the face of the Amendment or which subserves its purpose or which is in any sense recognized thereby. It is not conceivable that the sovereign people have by sheer inadvertence repealed as to the subject matter of alcoholic traffic the commerce clause and the Fourteenth Amendment *in toto;* particularly where these provisions of the Constitution are needed to buttress the Twenty-first Amendment itself. It is also difficult to understand that the commerce clause of the Federal Constitution remains subject to the Fifth Amendment but that now a State may exercise jurisdiction over the subject matter of interstate commerce wholly relieved of the inhibitions of the Fourteenth Amendment, and be at the same time empowered to enact retaliatory legislation which may drive a sister State in a less favored economic position to abandon resort to the second section of the

Twenty-first Amendment while its stronger sister effectually drives it to the wall by recourse to this very Amendment.

Thus, appellees' construction of the Amendment breaks down State's rights, the effectual separate sovereignty of the several States not in favor of true nationalism, but in favor of certain economically strong States, which by reason of the immense purchasing power of millions of consumers resident therein, may compel at their specific demand, other less favored States to write and rewrite their laws at the pleasure of the economically dominant States. Neither a believer in the doctrine of State rights or in the economic unity of the Nation or in ever growing nationalism can subscribe to this interpretation of the Twenty-first Amendment.

The dilemma must be resolved by the principles laid down by Mr. Justice Cardozo in *Baldwin* v. *Seelig*.

III.

Discussion of Authorities Cited by Appellees in Support of Retaliatory Legislation.

No authorities have been offered by appellees in their brief to support their contention that a State has the right to enact retaliatory legislation, the taking effect of which is conditioned upon the absence or presence in the laws of other States of statutory provisions objectionable to such State. But on pages 13 and 14 of the brief of appellees in the Missouri cases, numbered 252 to 256, in which practically the same questions are presented as in this case, several cases are offered in support of such alleged power.

The first case is that of *Philadelphia Fire Association* v. *New York*, 119 U. S. 110. The statute involved in this case was a law of New York which provided that whenever any other State required a greater license fee from a fire insur-

ance company domiciled in New York for the privilege of doing business in such State than was required by New York from foreign companies for the privilege of doing business in the State of New York, the Insurance Commissioner of New York was required to charge companies from such other State as a prerequisite to their rights to do business in New York a license fee equal to that imposed by such State on New York companies.

Appellant company had operated in New York under annual certificates from its insurance department for many years. Pennsylvania, the State of appellant company's domicile, then passed a law taxing foreign fire insurance companies three per cent of the amount of annual premiums collected in Pennsylvania for the preceding year as a prerequisite to the granting of a certificate of authority. New York thereupon demanded the same tax from appellant company. It was held by this Court (1) that appellant could not claim the benefit of the equal protection clause since it was not "within the jurisdiction" of New York, and (2) that insurance is not a "transaction of commerce." This Court on page 119 said:

> "If it imposes such license fee as a prerequisite for the future, the foreign corporation, until it pays such license fee, is not admitted within the state or within its jurisdiction. It is outside, at the threshhold, seeking admission, with consent not yet given."

Hence, it will be seen that the validity of the retaliatory legislation was not considered by this Court.

In the case of *Hendrick* v. *Maryland*, 235 U. S. 610, likewise cited by appellees in support of this proposition, the decision reveals that Maryland had a law providing that any owner or operator of an automobile using the highways of Maryland should be required to hold a certificate of registration under the laws of Maryland; but with the pro-

viso that any owner or operator, resident of another State, who had complied with the laws of registration of the State of his residence, might, upon application therefor, obtain permission from the Motor Vehicle Commissioner of Maryland to operate his automobile upon its highways for a limited period without registration in Maryland, but that such proviso or exception should not apply to residents of the District of Columbia. Appellant, a resident of the District, was arrested in Maryland for operating his automobile on its highways without a certificate of registration from Maryland. Appellant claimed that such Act was void because it discriminated against residents of the District of Columbia. This Court, however, did not pass upon such question, as is shown in the following quotation from page 621:

> "If the statute is otherwise valid, the alleged discrimination against residents of the District of Columbia is not adequate ground for us now to declare it altogether bad. At most they are entitled to equality of treatment, and in the absence of some definite and authoritative ruling by the courts of the state we will not assume that upon a proper showing this will be denied. The record fails to disclose that Hendrick had complied with the laws in force within the District of Columbia, or that he applied to the Maryland Commissioner for an identifying tag or marker—prerequisites to a limited use of the highways without cost by residents of other states under the plain terms of Sec. 140a. He cannot therefore set up a claim of discrimination in this particular."

This case not only fails to sustain the right to discriminate but, inferentially, at least, suggests that residents of the District of Columbia are entitled to "equality of treatment" with residents of the various States of the Union.

The case of *Kane* v. *New Jersey*, 242 U. S. 160, presented the question as to whether one State is required to grant reciprocity to the owners of automobiles from other States

in the use of its highways and this Court there held that while many States had provided for such reciprocity in their laws, the absence of such provisions constituted no discrimination against non-residents. Hence, it will be seen that this case does not support such proposition.

Appellees in the instant case have suggested that the case of *Whitfield v. Ohio*, 297 U. S. 431, supports the right of a State to discriminate against the products of other States. Appellant Whitfield was prosecuted in Cleveland for violation of an Ohio law forbidding the sale in the open market of convict-made goods of another State. Ohio likewise had a similar statute forbidding the sale in the open market of convict-made goods in Ohio. This Court in its opinion discusses the Hawes-Cooper Act, declaring it to be in substance the same as the Wilson Act concerning intoxicating liquors in that it abolished the original-package doctrine as to convict-made goods. The opinion declares that it is well known that free labor, properly compensated, cannot compete with convict labor, and apropos of this fact says on page 439:

> "A state basing its legislation upon that conception has the right and power, so far as the Federal Constitution is concerned, by non-discriminating legislation, to preserve its policy from impairment or defeat, by any means appropriate to the end and not inconsistent with that instrument."

It will be noted that this Court expressly requires the legislation to be non-discriminating.

The case of *Kentucky Whip & Collar Co.* v. *Illinois Central R. R. Co.*, 299 U. S. 334, discusses the Ashurst-Summers Act which followed the Hawes-Cooper Act and which makes it unlawful to ship convict-made goods in interstate commerce into any State where the goods are intended to be received, possessed, sold or used in violation of the laws of such State. The Court shows on page 350 that the trend of laws on convict-made goods follows closely the Congres-

sional Acts on transportation of liquor and that the Act under discussion is analogous to the Webb-Kenyon Act. Nothing in the decision supports appellees' proposition that retaliatory or discriminatory legislation can be indulged in by any State against certain of its sister States.

The case upon which chief reliance is placed by appellees and by the three-judge statutory court of Michigan is *A. & P. Tea Co.* v. *Grosjean*, 301 U. S. 412, ordinarily referred to as the *Louisiana chain store tax* case. The sole question in this case was whether the State of Louisiana in determining the amount of tax to be collected from chain stores operating within the State of Louisiana, could take into consideration the number of stores of the same chain operating outside of Louisiana. This Court had previously held that a State has the power to graduate chain store taxes upon the basis of the number of chain stores in the chain, on the theory that the greater number of stores the greater the competitive advantage of each store of such chain. Theretofore, such laws had been based on the number of stores within the particular State levying the graduated tax. However, the Louisiana law, for the purpose of determining such competitive advantage to the stores in the State of Louisiana, included all stores in the chain whether within or without the State, although the tax was levied against such stores only as were located within Louisiana. In discussing this competitive advantage, this Court said:

> "If the competitive advantages of a chain increase with the number of its component links, it is hard to see how these advantages cease at a state boundary. Under the findings a store belonging to a chain of one hundred, has not the same competitive advantages as one of one hundred Louisiana stores belonging to a national chain of one thousand."

It will, therefore, be seen that this case does not in any manner uphold the right of a State to exert extra-territorial

pressure upon any other State, its Legislature or its people, but merely permits the State, in determining the amount of tax to be levied within its borders to take into consideration any facts which will assist it in determining the respective competitive advantages of the stores within its jurisdiction.

IV.

Reply Argument.

1. The adoption of a regulation merely postponing the effective date of the challenged regulation does not render the present controversy moot.

Pierce v. *Society of Sisters*, 268 U. S. 510, 535, 536;
Vicksburg Water Works Co. v. *Vicksburg*, 185 U. S. 65, 82 (46 L. Ed. 808, 815).

2. Appellee's contention is unsound that appellant is not entitled to claim the benefit of the equal protection clause in respect to its interstate alcoholic sales and deliveries to its customers, the licensed wholesalers resident within the State of Michigan and to obtain relief from threatened damage to that business, because such customers, residents of the State of Michigan, are by the challenged act and regulation deprived of the equal protection of the laws.

Pierce v. *Society of Sisters, supra;* and cases cited, p. 536;
Cases cited appellant's brief, p. 19.

3. If appellant's contentions concerning the unavailability to the appellant of the equal protection clause were sound, appellee's distinction becomes immaterial because appellant also relies upon the due process clause and the appellee concedes that the benefits of this clause are not limited to persons "within the jurisdiction of Michigan, appellee's brief, first paragraph p. 19, and appellee's discussion of

cases, p. 17, 18, 19; appellant's reliance on the due process clause, appellant's brief, p. 5, 6, 56;

Louis K. Liggett Co. v. *Baldridge*, 278 U. S. 105, 113;

also fourth specification of error, appellant's brief, p. 12, appellant's bill of complaint, Clause 11, D. R. 14, 29, amended section 11 G. R. 27, 29.

4. Appellee has offered no substantial reason to show that Section 40 of the Michigan Liquor Control Act depending for its application upon the laws of the State of origin of imported beer is not subversive of the second section of the Twenty-first Amendment or that such a law has a discernable public object and is, therefore, within the police power of the State.

(a) It is unsound to contend that Section 9 of the Indiana Beverage Act does not operate to channelize beer coming into the State of Indiana.

State Board of Equalization v. *Youngs Market Co.*, 299 U. S. 59, 62.

(b) It is not sound to contend that the requirement of an additional fee for State-wide privileges as against a smaller fee for local privileges enjoyed by the wholesaler without the importing privilege under the Indiana Act, or the requirement of additional surety bond to cover taxes on out of State beer in an equal amount imposed upon the local brewer, or the limitation in number of Ports of Entry of foreign beer is retaliatory or merely discriminatory against foreign beer or that the fact that the holders of Port of Entry permits are permitted as buyers to select brands of foreign beer, without any compulsion of law to discriminate against any out State beer, discloses any ulterior economic motive of discrimination against foreign producers divorced from regulation, especially when all licensed wholesalers in

the State may sell foreign beer, when once imported, upon the same terms upon which they sell domestic beer.

(c) In contrast with the Michigan Act the right to import or the manner of importation does not under the Indiana Act turn upon the kind of law the State of origin may have in force.

(d) It is not a correct representation of the position of the appellant to assert that appellant contends that the exercise by one State of the dispensation accorded by Section 2 of the Twenty-first Amendment operates to deprive any other State of any enactment properly within such dispensation and that, therefore, the first enacting State obtains any monopoly of advantage under this amendment.

(e) A retaliatory Act such as the Michigan Act, if the second section of the Twenty-first Amendment is construed to bring such retaliatory legislation within the dispensation accorded by the Amendment, operates not merely to punish a State which has already enacted legislation obnoxious to the four criteria set up in amended Section 40 of the Michigan Act, but is equally effective to deter States, which have not enacted any legislation making use of the dispensation of the Twenty-first Amendment, from enacting statutes which would bring their alcoholic products within the doom of the four criteria of the Michigan Act.

(f) Whether or not the Alcoholic Beverage Act of Indiana is a retaliatory Act rather than one primarily concerned with the policing of the respective streams of domestic and foreign beer, the rights of the appellant in no sense turn on what may be the will of the Legislature of Indiana so far as the rights of the appellant under the commerce clause and the Fourteenth Amendment in respect to

its shipments in interstate commerce into Michigan may be concerned.

(g) The appellees have wholly failed in their brief to deny even perfunctorily that the Michigan Act and the interpretation of the Twenty-first Amendment which would warrant such legislation will impair the integrity of the Twenty-first Amendment.

5. *Comparative view of a situation in Indiana and Michigan in respect to the beer industry.*

Indiana has but 17 licensed breweries.

Michigan has 53 licensed breweries.

Under the Indiana Alcoholic Beverage Act there can be but one (1) brewery for each 175,000 of population according to the last Federal census, or 18 breweries in all until after 1940 (Section 8, Ind. Al. Bev. Act).

Compared with 17 domestic breweries, Indiana has 13 port of entry licenses outstanding through which out-State beer may enter Indiana.

Both the breweries and port of entry licensees post bonds for payment of State gallonage taxes at same rate on domestic and foreign beer.

In the fiscal year 1937:

Indiana's 17 breweries produced 2,254,490 gallons of beer.

Michigan's 53 breweries produced 3,393,000 gallons.

Indiana has a population, according to last Federal decennial census, of 3,238,000; Michigan, 3,393,479.

According to the finding of facts, but 20% of the beer consumed in Michigan was imported before the present Act.

According to various tax collection reports of Indiana Excise Administrator, 29% of the beer consumed in Indiana is imported.

(Except as otherwise noted above, statistics are taken from United States Treasury Department Statistics, Fiscal Year 1937, p. 7).

Respectfully submitted,

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